80-455

NO.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1980

MRS. MARIA TOTH FUTO, in her capacity as the personal representative and administratrix of the estate of JOHN FUTO,

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, Intervenor

VERSUS

LYKES BROTHERS STEAMSHIP COMPANY, INC.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is a shipowner entitled to dismissal of an action brought pursuant to 33 U.S.C. §905(b) where the facts fail to support a finding of any negligence on the part of the shipowner?

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JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATEMENT OF THE CASE

The following facts are supported by the record and are undisputed:

On October 7, 1977 plaintiff was employed by Dixie Machine Welding & Metal Works, Inc., an independent contractor which was performing repairs on defendant's vessel the SS SHIRLEY LYKES. The vessel was moored at Dixie's facilities at the Andry Street Wharf in the Port of New Orleans. (Record, Vol. I, pp. 206, 222, 231, 273.)

Dixie had contracted with defendant Lykes to provide repair services as described in various clauses and specifications set forth in the contract, and agreed to do so in such a way as to meet the requirements of the applicable Classification Society and the United States Coast Guard. (Record Vol. I, pp. 32 *et seq.*, 222, 231, 273). Dixie further agreed to complete the work to the satisfaction to the owner's representative and to furnish all employees, materials, equipment, supervision and direction. Dixie also agreed fully to protect the ship and Lykes Bros. as owner against any and all claims for disability, injuries or death of Dixie's employees who would be engaged by Dixie to carry out the work "... on or pertaining to the vessel or vessels, and ... deliver... and keep in force a certificate indicating that [Dixie] ... complied with the provisions of the Longshoremen's and Har-

bor Worker's Compensation Act... securing of the payment of compensation under said Act." (Record, Vol. I, pp. 32 *et seq.*, 222, 231, 273.)

At the time of decedent's accident and at all times during the entire work process contemplated by the parties to the contract, the SS SHIRLEY LYKES was completely shut down. The vessel was without power or electricity except as furnished from ashore by Dixie. (Record, Vol. I, p. 200). The vessel remained afloat at the Dixie Wharf, but was neither moved nor was capable of movement under her own power. The SS SHIRLEY LYKES was therefore a dead ship undergoing extensive repairs and all work on the vessel was completely and solely under the control, direction and supervision of Dixie and Dixie's employees. (Record, Vol. I. p. 206.)

Representatives of Lykes Bros. boarded the vessel on occasion to see that the work product ultimately conformed to the plans and specifications of the contract. (Record, Vol. I, pp. 200, 222, 272.) Three Lykes Bros. employees were also assigned to the vessel for the limited purposes of vessel security and assuring that the vessel had a safe berth. (Record, Vol. I, p. 206).

The decedent's accident occurred while the decedent and fellow employees of Dixie were attempting to remove a boom step on the vessel as required by Item No. 44 of the job specifications. That item, among other tasks, called for Dixie to "erect the necessary scaffolding and remove on completion." (Record, Vol. I, p. 45 and deposition of Oscar Crespo, p. 3.)

Employees of Dixie constructed the scaffolding without assistance, direction or supervision on the part of the Lykes employees aboard the vessel. (Deposition of Crespo, p. 10) No Lykes employee was in the area at the time of the accident and no Lykes employee was aware that decedent was working on the scaffolding. (Record, Vol. I, pp. 199, 202, 203, 204, 246, 250, 255 and 279.) Decedent fell from the scaffolding platform when he attempted to work before the platform was complete. (Deposition of Crespo, p. 22.)

There is no suggestion in the record or depositions that Lykes or Lykes' employees knew or should have known that Dixie employees were performing or intended to perform work on the boom before they completed the platform. There is also no evidence in the record to establish or suggest that Lykes or anyone employed by Lykes was at or near the scene of the accident or exercised any control, direction or supervision of the work at the time of decedent's accident, prior to that time, or at any time thereafter. Furthermore, there is nothing to establigh or suggest that Lykes had any obligation directly, indirectly or otherwise to safeguard or supervise decedent's work or to oversee the construction of the scaffolding from which decedent fell. (Record, Vol. I, pp. 167, *et seq.*)

ARGUMENT

The arguments presented in support of plaintiff's petition for writ of certiorari are patently insufficient to uphold a grant of certiorari herein.

First, the split of authority among the circuits over the

appropriate Section 905(b) standard has absolutely no bearing on the outcome of this action. Defendant undeniably exercised no control, direction or supervision of the work and had no obligation directly, indirectly or otherwise to direct the day to day progress of the work. The scaffolding was neither supplied by nor erected by defendant and defendant owed no duty to dececent to inspect the work of the independent contractor. The Lykes Bros. employees on the vessel were not present at the scene of decedent's accident nor were they aware at that time or prior thereto that the Dixie employees had failed to complete the scaffolding and that decedent was attempting to work on the boom before the scaffolding was complete.

Assuming for argument that the firmly established standard expressed in *Brown v. Mitsubishi Shintaku Ginko,* 550 F.2d 331 (5th Cir., 1977) and embraced by the Second, Fourth, Fifth and Seventh Circuits is wrongly applied to actions arising out of Section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901, *et seq.*, and that the proper standard is the "reasonable care" standard expressed in *Johnson v. A/S Ivarans Rederi,* 613 F.2d 334 (1st Cir. 1980), all of which is denied, the facts still present no basis for finding negligence on the part of defendant Lykes Bros. Neither the vessel nor its interests owed any duty to the Dixie employees to inspect and safeguard the work product of those employees on the vessel. Further, the condition which caused decedent's death was not within the control of defendant and neither the vessel nor its interests knew or should have been aware of the

condition or that the condition could pose any risk of harm to Dixie's employees. Defendant accordingly owed no duty to protect plaintiff's decedent from the danger encountered and did not fail to exercise reasonable care under the circumstances. The "reasonable care" standard of *Johnson, supra*, would therefore compel the same result as the "open and obvious" standard of *Brown, supra*, given these undisputed facts.

Additional support for this position is found in *Stockstill v. Gypsum Transportation*, 607 F.2d 1112 (5th Cir. 1979), *reh.* and *reh. en banc den.*, where the court upheld a directed verdict on facts very similar to those here. Albeit application of the "open and obvious" test was affirmed, the court stated that the shipowner had absolutely no duty "to assume 'a vigilant concern for the well being of the contractor's employees,' particularly where they have failed to exercise due care in the course of their work." 607 F.2d at 1117, citing *Fitzgerald v. Compania Naviera La Molinera*, 394 F.Supp. 413 (E.D. La., 1975).

Petitioner's second argument similarly fails to disclose any reason for overturning the decisions of the district court and the Court of Appeals. Section 343 of the Restatement (Second) of Torts (1965) requires proof that the possessor of the property:

1) knew or should have known of the condition, *and*
2) should have expected that the invitees would not realize the danger *and*
3) failed to take reasonable precautions to protect them against the danger.

There is nothing in the record to suggest that defendant's employees knew or should have known of the condition of the scaffold. Clearly, mere presence of the employees aboard the ship is not enough. *Stockstill v. Gypsum Transportation, supra,* at 1117. There is also nothing to indicate that defendant or its employees knew that decedent or other Dixie employees were working on the scaffolding before it was complete or that defendant should have realized that decedent would fail to protect himself. Accordingly, defendant could not have failed to exercise reasonable care to protect decedent.Accordingly, there can be no question but that defendant has no liability as determined by application of the cumulative requirements of Section 343.

Similarly, if Section 343 (A) of the Restatement is invoked, defendant cannot be found liable under these facts. Defendant's employees may have realized the danger after the fact, but could not have anticipated the accident where 1) they were not aware of the condition; 2) they were not aware that decedent or other Dixie employees were working on the scaffolding; and 3) they could not have known that decedent would attempt to work on the scaffolding before it was complete.

It is respectfully submitted that the facts established in the record leave no basis for inferring any possible negligence on the part of defendant Lykes Bros. Steamship Company, no matter which of the standards is applied, It is further submitted that the District Judge properly considered the available evidence in the light most favorable to plaintiff and determined that there was no issue of material fact as to the question of de-

fendant's negligence. Accordingly, defendant requests that this Honorable Court deny plaintiff's petition.

CONCLUSION

For the reasons set forth above, the petition for writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William E. Wright, attorney for respondent Lykes Bros. Steamship Company, Inc. and a member of the Bar of the Supreme Court of the United States, hereby certify that service of three copies of the foregoing Brief in Opposition has been made on Alonzo T. Stanga, III, attorney for petitioner, and Peter L. Hilbert, Jr., attorney for petitioner-intervenor, by depositing same in the United States mails, postage prepaid and properly addressed, this day of October, 1980.

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